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HAROLD B. WILLE

In the Supreme Court of the United States

OCTOBER TERM, 1952.

No. 586.

ROY A. H. KNISELY,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

BRIEF OF PETITIONER IN REPLY TO BRIEF OF UNITED STATES IN OPPOSITION.

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Petitioner's reply to the government's brief in opposition to the granting of Certiorari shall be confined to such points only as merit further discussion.

I. THE TRIAL COURT ERRED IN PERMITTING THE PROSECUTOR TO REFER IN HIS CLOSING ARGUMENT TO DEFENDANT'S "PAST REPUTATION."

The government's brief raises three contentions as answers to petitioner's argument on this point, viz:

(a) such argument is permissible, because, contrary to petitioner's contention that it deprives him of the benefit of the presumption of innocence, there is no such presumption;

(b) factual basis for the prosecutor's argument was supplied by the remarks of Mr. Lambert, one of petitioner's counsel, in his closing argument for which the government cites page 203 of the record; and,

(c) the prosecutor's remarks were merely retaliatory to those of Mr. Lambert.

We shall answer these seriatim.

(a) The authorities have laid the rules for ages that such argument deprives the defendant of the presumption of good character; that it is the defendant's exclusive privilege to raise the issue of his good character; and that he can do this only by introducing in the first instance proofs of his claimed good character.

McKnight v. United States, 97 Fed. 208, 38 C. C. A. 115;
1 *Bishop, Cr. Proc.*, Sec. 1119.

The government claims in effect that the rule was abolished by the decisions of this Court in *Greer v. U. S.*, 245 U. S. 559, and *Michelson v. U. S.*, 335 U. S. 469, to the effect that there is no presumption of a defendant's innocence. While this Court so held in the *Greer* and *Michelson* cases, it reiterated the rule that such argument is prejudicial error requiring reversal upon the ground that such argument deprives the defendant of the exclusive right to raise and litigate the question of his good character.

In the *Greer* case, *supra,* this Court said:

"As the government cannot put in evidence (defendant's character) except to answer evidence introduced by the defense the inference is that the prisoner is allowed to prove a good character for what it is worth, but the choice whether to raise the issue rests with him * * *.

The meaning is that character is not an issue in the case unless the prisoner chooses to make it one; * * *"

In the *Michelson* case, *supra,* this Court recently held that the defendant has the exclusive right in a criminal prosecution to raise the question of his good character; that this can be done only by the introduction by defendant of evidence pertinent to such question; that in the first instance such evidence must come from the defendant; and that the prosecution has no right to suggest or raise the question until after the defendant has done so. The Court said (335 U. S. pp. 474-475):

> "Courts that follow the common law tradition almost unanimously have come to disallow resort by the prosecution to any kind of evidence of a defendant's evil character to establish the probability of his guilt. Not that the law invests the defendant with a presumption of good character (citing the Greer case), *but it simply closes the whole matter of character, disposition and reputation on the prosecution's case in chief.*"

Hence, while the *Greer* and *Michelson* cases may have changed the reasons for the rule against such argument, these cases not only reiterate the rule itself, but underscore it as settled law in cases of this kind.

(b) The record at page 203 shows that Mr. Lambert did not say one word about the prisoner's reputation. He simply characterized the information furnished by defendant to officers of the government as "honest." To say that what a party did was "honest" is far different from saying that such a party had a "reputation" for honesty or as being honest. We respectfully submit that the government had misread this page of the record.

(c) There was no basis for the prosecutor's reference to defendant's reputation as a retalitory argument to the one made by Mr. Lambert at page 203. It is undisputed,

and likewise it is indisputable, that the defendant offered no evidence at all concerning his character and reputation. Where, as here, the defendant has not introduced any evidence as to his character and reputation, it is reversible error for the trial court to permit the prosecuting attorney to refer to the matter (cases and authorities cited in our main brief), even though such argument is in reply to similar argument by defendant's own counsel. The government's remedy, where the defendant's counsel goes out of the record by referring to defendant's good character and reputation in the absence of evidence upon such question, is to have the trial judge stop him and not to retaliate in kind by itself going out of the record and indulging in like argument. To permit the prosecution to engage in such argument under such circumstances is to overlook the fundamental facts that a defendant's guilt is to be determined by evidence received in open Court in an orderly trial and that such argument by a prosecutor converts a trial into a sort of verbal brawl with the consequence that defendant's guilt is not determined according to law and the evidence, but rather according to the brawling abilities of counsel.

The rule is supported by the authorities:

Bennett v. State, 86 Ga. 401, 12 S. E. 806, 12 L. R. A. 449, 22 A. S. R. 465;

U. S. v. Toscano, 2 Cir. 166 F. (2d) 524;

53 *Am. Jur.*, Trial, Sec. 478;

23 *C. J. S.*, Crim. Law, Sec. 1108.

In the *Bennett* case, *supra*, the court said:

"The fact that the prisoner's counsel had violated the rule (against commenting on the prisoner's alleged good character where there is no evidence concerning

> the matter) would not authorize the State's counsel to do likewise. To hold that because counsel on one side violates a rule of this court in his address to the jury by making statements outside the evidence the opposing counsel has the right to violate the rule in like manner, over objections of opposing counsel, would be to turn a court, where justice should be administered according to the rules of evidence and of law, into a town meeting."

In the *Toscano* case, *supra,* this question was considered in a well written opinion by Circuit Judge Augustus N. Hand. The syllabus summarizes the decision so well that we quote it:

> "In a prosecution for unlawfully possessing heroin and morphine sulphate, summation of government's counsel that package which contained the narcotics might show defendant's fingerprints was improper, even though provoked by references by defendant's counsel to facts outside record, where government introduced no evidence to show any fingerprints and error was not eliminated by judge's statement that jury was to decide case only on the evidence."

In any view, it seems to us that the Court must hold that the prosecutor's argument constituted reversible error. It was not only legally so, but factually so because of the prejudice generated against defendant by the circumstances we have already mentioned—the parade of the women, no male witnesses except those who testified as to services rendered by defendant to women and the general air of prejudice surrounding defendant at the trial.

II. IT WAS PREJUDICIAL ERROR FOR THE TRIAL COURT TO REFUSE TO INSTRUCT SPECIFICALLY THAT, IF THE JURY SHOULD FIND THAT THE BOOK MARKED GOVERNMENT'S EXHIBIT 4 WAS NOT THE IDENTICAL BOOK DELIVERED BY DEFENDANT TO THE GOVERNMENT'S AGENTS ON MARCH 14, 1949, IT SHOULD FIND HIM NOT GUILTY.

The government now for the first time takes the position that the request to so charge was not timely and not in due form. At the trial, neither the trial judge nor the prosecuting attorney thought so. The latter made no objection upon that ground. The trial judge's refusal to so charge was not based on such ground. At page 189 of the record the defendant's written request to so charge with reference to this book was considered by the court, which at that time indicated that it would give such a charge, but not in the form requested. At page 225 of the record the matter was again considered. It is plain that the court understood that plaintiff's request was for a specific charge on the point and that the charge actually given satisfied the request. The record shows:

> "Mr. Peterson: The defendant requests the Court to charge the jury that if the book marked Government's Exhibit 4 is not the document that was delivered to the agents of the Bureau of Internal Revenue on March 14, 1949, for the jury to find the defendant 'not guilty.'
>
> The Court: Don't you think I have made that plain to the jury?
>
> Mr. Peterson: I hesitate to make any suggestion as to the Court's charge. It was admirable. I am just wondering if that shouldn't be done to bring it right home.
>
> The Court: That has been the gist of the whole charge to the jury. I don't believe I want to further emphasize the matter. I believe I made it plain in a

number of places in the charge. The request will be refused."

The charge actually given was entirely inadequate to bring the jury to grips with this question and it was prejudicial because this question was the decisive one. Our main brief covers this point fully. It is hardly fair, in view of this record, for the government to make the claims it now asserts.

III. IT WAS PREJUDICIAL ERROR TO REFUSE TO CHARGE THAT THE INDICTMENT WAS NOT EVIDENCE AND WAS NOT TO BE CONSIDERED AT ALL.

The government contends (pp. 14-15) that the charge was adequate because it stated that the indictment did not raise "a presumption" of guilt and that "neither the indictment, the opening statements of counsel nor the arguments of counsel are evidence in the case and none of them are to be considered by you as evidence * * *." The first part of the charge referred to here is inadequate because it limits the effect thereof to a "presumption" without defining what a presumption is and without stating that the indictment is not evidence at all. The second part of the charge referred to likewise is inadequate because it omitted to state that the indictment was not to be considered "at all." It failed to *specifically* direct the jury's attention to the point. It was important to make the charge specific so the jury would have no misunderstanding of the point.

IV. IT WAS PREJUDICIAL ERROR TO REFUSE TO ACCEPT DEFENDANT'S OFFER TO STIPULATE FACTS.

The first duty of the court is to accord to a defendant a fair and impartial trial. This includes the elimination of prejudice so far as it lies in the Court's power to do so. Here, the stipulation (1) would have established every fact which the testimony of the women witnesses would

have or did establish and (2) would have eliminated the prejudice against defendant generated by the women witnesses. The refusal of the trial court to accept the stipulation resulted in a trial atmosphere fraught with prejudice against defendant. The acceptance of the stipulation would have eliminated such prejudice. Because all this is true, the defendant was deprived the fair and impartial trial to which he was entitled, which he could have had if the court had exercised its power to protect him, and which was denied to him by the Court's failure to protect him.

This point has been fully covered in our main brief.

V. THE STATUTES SHOULD BE CONTRUED AS MAKING THE OFFENSE CHARGED ON THE INDICTMENT A MISDEMEANOR.

We rely on our main brief. The government brief contains nothing new.

VI. THE COURT OF APPEALS ERRED IN REFUSING TO REMAND TO TRIAL COURT TO CONSIDER MOTION TO SUPPRESS.

Prior to the trial, the defendant timely made motions for orders:

1. (a) for the return by the government and its agents to defendant of his "1947 Appointments Book," card indexes containing records of defendant's appointments and charges during 1947, photographs of the interior of defendant's office and furnishings and contents thereof, and,

(b) for the suppression of the use of the same and of the statements of the women named in the indictment obtained by the use thereof, upon the grounds that said evidence was unconstitutionally ob-

tained by an unconstitutional and illegal breaking, entry, search and seizure of the same in defendant's office in violation of the Fourth and Fifth Amendments to the Constitution of the United States (R. pp. 36-37).

Defendant cited in support of said motion:

Federal Rules of Criminal Procedure, Rule 41 E, Form ID, Rule 16;
McDonald v. United States, 335 U. S. 451;
Nardone v. United States, 308 U. S. 338;
Baxter v. United States, 188 F. (2d) 119.

2. For the discovery and inspection of the documents referred to in the preceding motion (R. pp. 35-36),

3. For inspection of the minutes of the Grand Jury which returned the indictment in this case, and

4. For the taking of oral testimony of the government's agents who had charge of the investigation of this case (R. p. 38).

The assistant United States Attorney, who was prosecuting the case, made a return that he had no knowledge of the existence of said documents. At the hearing on the motions, it became apparent that defendant's only proof of the unconstitutional search and seizure were the affidavits showing that there had been an unlawful entry and seizure, but none to show that these acts had been committed by agents of the Bureau of Internal Revenue, other than a strong inference that such was the fact. It also appeared at that time that by reason of the court's denial of defendant's application for leave to take oral testimony that defendant would be unable to produce further proof to substantiate the charges of an illegal search

and seizure. Thereupon, the trial judge stated that the motions would be withdrawn "subject to being renewed" (R. p. 43).

The affidavits in support of the motions showed that on March 14, 1949, defendant delivered to agents of the Bureau of Internal Revenue, his regular "1947 Appointments Book"; that these agents kept the book a short time and then returned it to defendant; that between March 14, 1949 and November 1, 1949, the "1947 Appointments Book" and card record of defendant's patients were taken from defendant's office by means of an unlawful breaking and entry therein; that at the same time, photographs were taken of the interior of the office and its furnishings; that immediately thereafter, defendant prepared from memory and wrote in his own handwriting government's Exhibit 4 which also was labeled "1947 Appointments Book," but which in fact was a different book from the one seized by means of the unlawful entry; that on December 5, 1949, agents of the Bureau of Internal Revenue called at defendant's office and demanded of him his "1947 Appointments Book"; that thereupon defendant delivered to them government's Exhibit 4 and advised them as to how it was prepared and that it contained many inaccurate statements. These facts are set forth fully on pages 4 and 5 of the Petition for Certiorari herein.

Upon the trial, the major and controlling issue was whether defendant on March 14, 1949 furnished to agents of the government, government's Exhibit 4, which was labeled "1947 Appointments Book," or another and different book which defendant claimed was the one he kept and made entries in from day to day during 1947. There was no evidence that the entries in the last mentioned book were untrue. Consequently, if defendant furnished that book to the government's agents, he had committed

no offense and should have been found not guilty. If, as the government claims, defendant furnished to such agents government's Exhibit 4, the question still remained whether he had informed them that the book contained inaccurate entries and because of such fact defendant did not knowingly furnish them a book containing false statements. If the regular book had been produced, the production thereof would have been decisive that defendant did not furnish a document to the government's agents containing false entries. Therefore, the production of that book was of paramount and controlling importance.

After the appeal had been perfected and the case set for argument in the Court of Appeals, defendant moved the Court of Appeals to remand the case to the District Court for the purpose of enabling defendant to there renew his motion for the return of said documents and to suppress all evidence by means of use thereof. The motion to remand was based upon the facts and information obtained by defendant's attorneys, Roy H. Lambert and Harry H. Peterson, on November 17, 1952, which was approximately 7 months after the trial below and about 2½ weeks before the argument of the appeal in the Court of Appeals, and which is incorporated in the separate affidavits of said attorneys in support of said motion; that affidavits were identical except for the reference therein to the other attorney. Mr. Lambert's affidavit states:

> "That on Thursday, November 17, 1952, Mr. Harry H. Peterson and affiant, as the attorneys for defendant-appellant, were informed by Mr. Percy H. Wilson, an assistant attorney-general of the United States in the Tax Department of the Attorney-General in Washington, D. C., that prior to the indictment of said defendant-appellant he, said Percy H. Wilson, as such assistant-attorney-general, had in his possession cer-

> tain photographic pictures of the interior of appellant-defendant's office, certain records of defendant-appellant, and, as he remembered but was not then sure, an account book of appellant-defendant; that prior to the indictment herein, all documents aforesaid were forwarded to officials of the United States in Ohio for use in litigation to be instituted against defendant-appellant and the same have ever since remained in possession of said officials, so far as said Percy H. Wilson is informed."

That the government made no written return to said motion or answer to said affidavits, but on the contrary contented itself with a statement by the assistant United States attorney that he had called on the telephone Mr. Percy H. Wilson, assistant attorney-general of the United States, and he had been orally informed by him, that, while the attorney-general had had the documents referred to in its possession as stated in the foregoing excerpt from the affidavit of defendant's attorneys, he could not say positively whether or not the attorney-general had had defendant's "1947 Appointments Book" in his possession.

It is apparent that these documents, including defendant's original "1947 Appointments Book" are in the hands of the agents of the government; that the government's agents will not produce these documents voluntarily; and that compulsory process for such purpose is necessary to secure the production thereof. Likewise, it is clear that, if the case were remanded to the District Court and the motion to return and to suppress was there renewed by the defendant, the defendant could not only compel the production of these documents but also could establish thereby the truth of his defense. The failure of

the Court of Appeals to grant this motion was therefore prejudicial error.

After all, the great concern of the government in a case of this kind should be to have a most thorough investigation of the facts in order that the guilt or innocence of the defendant may be determined upon legal evidence. No man's conviction should be left in the doubt which surrounds that of defendant, especially where, as here, it appears likely that the facts are as defendant claims them to be; where, if such facts were established they would show defendant's innocence; where the defendant has endeavored to show such facts and the government has successfully opposed his efforts; and where the lower court has refused to lend its aid to defendant to show the facts. Ordinary fairness and truth demand that the facts be established. The only way of doing so is by remanding the case to the trial court in accordance with defendant's motion.

It is clear that, if the facts are as the defendant alleges them to be, the evidence upon which defendant's conviction rests was unconstitutionally and illegally obtained and the conviction should be set aside.

McDonald v. United States, 335 U. S. 451;
Nardone v. United States, 308 U. S. 338;
Gouled v. United States, 255 U. S. 298;
Baxter v. United States, 188 F. (2d) 119;
U. S. v. Lydecker, 275 Fed. 978.

CONCLUSION.

We believe that this case presents new and important questions for decision. We believe that the Petition for Certiorari should be granted to review what we believe to be grave errors involving denial of justice to defendant. The questions presented are important not only to defendant, but also to the administration of justice.

Respectfully submitted,

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PETITION FOR REHEARING OF PETITION FOR WRIT OF CERTIORARI.

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Now comes the petitioner above named and for his petition for a rehearing herein respectfully states and shows:

1. That manifest errors and omissions occurred as a result of failure of this Court to find errors that were committed at the trial by failure of the District Court and the Circuit Court not allowing the defendant-appellant to show that the evidence obtained by the Government Agents was wrongfully obtained by entering his office or by having informers enter his office without his consent and going through his books and papers and thereby obtaining evidence which they used at the trial of this cause.

2. The indictment charging the defendant-appellant with violation of U. S. C. A. Title 18, Section 1001 says that the defendant must knowingly and willingly make false statements with intent to defraud the Government. The

indictment as drawn is not complete under Title 18, Section 1001 and therefore does not state a crime charge.

3. The trial court erred in the charge to the jury in that the charge did not state to the jury they must find the book presented for 1947 to be the book presented to the agents and that the defendant gave this book with intent to defraud the government. As the evidence showed, this book was not at any time read by the agent when presented but was leafed through and the agents remembered one line and one name and at this time the Government made no reliance on this book.

4. Title 18 U. S. C., Section 1001 is a general section covering any false or fraudulent information given to the Government agents and Section 3618 of the Internal Revenue Code is a specific section covering false information to the Internal Revenue. This Court has never passed upon this question which has been presented several times to the Appeal Court. The petitioner desires that this Court rule which statute should control in this type of case.

5. The Court erred in not giving requested instruction that the indictment was not evidence.

6. The defendant's reputation was brought into the trial without him raising the same and to make it far more impressive on the minds of the jury, the defendant's wife was questioned about numerous years back which had no bearing on this case only to influence the minds of the jury which is shown in the testimony.

WHEREFORE, the petitioner respectfully petitions the Court for a rehearing on his Petition for Writ of Certiorari.

Respectfully submitted,

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Certificate of Counsel.

We, the undersigned counsel for defendant-appellant in the above case, do hereby certify that the Petition for Rehearing, hereto annexed, is not filed for the purpose of delay, but for other substantial grounds not previously presented.

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April 14, 1953.